Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

JAMES S. and REBECCA DEATON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for A Writ of Certiorari to
The United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A three-foot wide roadside drainage ditch runs alongside the property of James and Rebecca Deaton in rural Wicomico County, Maryland. The roadside ditch was built and is maintained by the county roads department and connects to a ditch system operated by a public association established under state law to address local drainage problems. The Deatons dug a ditch on their property and, in so doing, disturbed an area the United States Army Corps of Engineers considers a wetland. There is no showing that common dirt—the pollutant at issue—left the Deatons' property, flowed into the roadside ditch, or reached any truly navigable waters.

The questions presented are:

1. Are the roadside ditch and the wetland next to it "navigable waters" under the Clean Water Act?

2. Where activity in a wetland has not degraded either a nonnavigable roadside ditch next to the wetland or a downstream traditional navigable water, does Congress's commerce power over navigation allow federal regulation of that wetland or that roadside ditch?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The Petitioners are James S. and Rebecca Deaton, residents of Wicomico County, Maryland. The Respondent is the United States, acting through the United States Army Corps of Engineers.

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The opinions of the U.S. District Court for the District of Maryland are unreported. (27a-51a.) The Fourth Circuit's opinion is reported, 332 F.3d 698 (4th Cir. 2003). (1a-26a.)

JURISDICTION

The Court of Appeals entered judgment on June 12, 2003. (1a.) On August 11, 2003, it denied Petitioners' Request for Rehearing. (52a.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTES

The Commerce Clause, U.S. Const. art. I, § 8, cl. 3: Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States...."

Pertinent sections of the Clean Water Act are reproduced in the Appendix. (53a-61a.)

STATEMENT

This case is about the outer reaches of federal environmental regulation. The Fourth Circuit held that a three-foot wide upland ditch along a two-lane country road outside Parsonsburg, Maryland—separated from the closest navigable-in-fact waterbody by over eight miles of other ditches, intermittent streams, dams, ponds, and culverts—is a "navigable water" under the Clean Water Act (CWA). Thus, when the Deatons dug a ditch through land the Corps considers a wetland near the roadside ditch, that activity was subject to the CWA's prohibitions, permitting requirements, and civil and criminal penalties.

The court below reached this conclusion although the Corps never claimed (or showed) that dirt disturbed by the Deatons' ditching left the property or reached the roadside ditch, much less downstream navigable waters. Rather,

the Fourth Circuit upheld federal jurisdiction on the unproven assumption that water in the roadside ditch "eventually flows" to, and sediment could "potentially" reach, navigable water. Such reasoning contravenes two decisions of this Court. *United States v. Riverside Bayview Homes,* 474 U.S. 121 (1985) (*Riverside*) and *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 151 (2001) (*SWANCC*), require that nonnavigable waters have a "significant nexus" to navigable waters to qualify as "waters of the United States." The Fourth Circuit's "eventually flows" test also conflicts with the Fifth Circuit, which rejected federal jurisdiction over an intermittent stream with only an attenuated connection to navigable waters. The Fifth Circuit effectuated the "significant nexus" principle by requiring a "close, direct, and proximate link" to navigable waters. *Rice v. Harken Exploration Co.*, 250 F. 3d 264, 272 (5th Cir. 2001) (*Rice*).

The issues presented by this case are profoundly important because they implicate "the significance of federalism in the whole structure of the Constitution." *See United States v. Lopez,* 514 U.S. 549, 575 (1995) (Kennedy, J., joined by O'Connor, J., concurring). The roadside ditch at issue is far removed from truly navigable waters. It is maintained by the Wicomico County roads department to handle rainwater draining from the road surface. It feeds into a series of other ditches constructed and maintained by the Beaverdam Public Drainage Association (PDA), an entity established by citizens under Maryland law to address local drainage problems. Under the Court of Appeals' reasoning, all of these local ditches and all wetlands "adjacent" to them will be regulated under the CWA because the ditches all eventually connect to "navigable waters." Such an astonishing expansion of federal authority cannot be sustained because it would "result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC,* 531 U.S. at 174.

Given the clear split in the circuits, the contradiction of this Court's decisions, the serious constitutional implications, and the importance of the issues to landowners and regulators alike, the Court should grant certiorari.

I. Statutory and Regulatory Framework.

In 1972, Congress passed the CWA, 33 U.S.C. §§ 1251-1387, to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." *Id.* § 1251(a). Congress established a variety of funding, research, and regulatory programs to pursue that goal.[1] (*See* CWA table of contents, 53a-57a.)

As it designed this comprehensive pollution abatement scheme, Congress chose to "recognize, preserve, and protect the primary responsibilities of States...to plan the development and use...of land and water resources." 33 U.S.C. § 1251(b). Thus, the states establish quality standards and beneficial uses for their own waterbodies, control water quantity allocations and groundwater, and address nonpoint sources of pollution, such as sheetflow and agricultural runoff.[2]

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[1] *See, e.g.*, 33 U.S.C. Subch. I §§ 1251-74 (research and grant programs to study water pollution); *id.* Subch. II §§ 1281-1301 (grants for construction of publicly owned treatment works); *id.* Subch. III §§ 1311-1330 (establishment and enforcement of standards, including water quality standards and effluent limitations); *id.* Subch. IV §§ 1341-1346 (issuance of permits and licenses). *See also* programs aimed at specific waterbodies, *e.g.*, 33 U.S.C. §§ 1266 (Hudson River) and 1267 (Chesapeake Bay); and programs aimed at specific pollutants, *e.g.*, 33 U.S.C. §§ 1257 (mine water pollution) and 1265 (toxic pollutants).

[2] *See, e.g.*, 33 U.S.C. § 1251(g) (state authority to allocate water quantities within their jurisdiction); *id.* §§ 1311-1314 (state responsibility to develop water quality standards); *id.* § 1313(d)(1)(C) (state responsibility to establish "total maximum daily loads" for certain pollutants, or the maximum permissible level of pollutants allowed in designated impaired waters); *id.*

One element of Congress's multi-faceted, federal-state approach is section 301(a), which prohibits the "discharge of any pollutant by any person" unless permitted in the Act. 33 U.S.C. § 1311(a). "Discharge of a pollutant" means "any addition of any pollutant to *navigable waters* from any point source." *Id.* § 1362(12) (emphasis added).

Congress defined "navigable waters" to mean "the waters of the United States, including the territorial seas." *Id.* § 1362(7). Corps regulations (*see* 61a-62a) define "waters of the United States" to include, *inter alia*, traditional navigable waters, (33 C.F.R. § 328.3(a)(1)); "tributaries" of such waters (*id.* § (a)(5)); and "wetlands" that are "adjacent" to any of the above waters (*id.* § (a)(7)). While the regulation defines "adjacent" (*see* 63a), it does not define "tributaries" or suggest that ditches are "waters of the United States." In fact, the Corps has consistently disclaimed jurisdiction over upland ditches since the CWA's enactment.[3]

Moreover, the CWA states that a ditch falls within the definition of a "point source," which means that discharges of pollutants *from* ditches *into* navigable waters require a permit.[4] But the Act nowhere states that

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§ 1329 (state responsibility to develop nonpoint source management programs for navigable waters within the state).

[3] *See* 40 Fed. Reg. 31,320, 31,321 (July 25, 1975) (drainage and irrigation ditches "excluded" from definition of jurisdictional waters); 42 Fed. Reg. 37,122, 37,144 (July 19, 1977) ("manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States"); 45 Fed. Reg. 62,732, 62,747 (Sept. 19, 1980) (same); 48 Fed. Reg. 21,466, 21,474 (May 12, 1983) (same); 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (Corps "generally" does not consider ditches excavated on dry land to be waters of the United States, but may claim otherwise "case-by-case").

[4] "Point source" means "any discernible, confined and discrete conveyance, including but not limited to any...ditch...." 33 U.S.C. § 1362(14). (*See* 60a-61a.)

ditches *themselves* (or any other point sources) are jurisdictional waters.

II. The Ditches of Wicomico County.

The roadside ditch that is the subject of this case (pictured at 78a) was probably built in the 1940s when Morris Leonard Road was still a dirt road. Today, the Wicomico County roads department maintains the ditch to collect and convey rainfall runoff that otherwise would stand on the road. The roadside ditch is approximately 2 to 3 feet wide as it passes in front of the Deatons' property. (72a.) Sometimes it carries water; other times it is dry. It contained 3 to 4 inches of water on October 22, 1996. (72a.) The closest navigable-in-fact body of water is the Wicomico River, which lies eight miles away over a course punctuated by five culverts, three ponds, and five dams.[5] (*See* 77a diagram.)

After fronting the Deatons' property, the roadside ditch connects to a culvert under Morris Leonard Road near the corner of the Deatons' property. At the culvert, the roadside ditch meets the drainage ditch dug by the Deatons across their property. The culvert connects to another ditch system constructed, maintained, and managed by the Beaverdam Public Drainage Association (PDA). PDAs are creatures of state law, formed at the grassroots level by:

> [A] petition signed by not less than one third of the landowners...in a watershed [and] filed with the clerk of the...county commissioners...describing ...the need for drainage for optimal crop production

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[5] The record (73a-74a, 77a) documents the obstructions between the roadside ditch and the Wicomico River. Five culverts, under: (1) Morris Leonard Road; (2) Maryland Route 376; (3) Maryland Route 346; (4) Walston Switch Road; (5) U.S. Route 50. Three ponds: (1) a "private pond" created by Hobbs Road Dam; (2) Parker Pond; (3) Schumaker Pond. Five dams: (1) Hobbs Road Dam; (2) North Schumaker Drive Dam; (3) Beaglin Park Drive Dam; (4) Beaverdam Drive Dam; (5) Snow Hill Road Dam.

> and that the public benefit...would be promoted by draining or ditching....

Md. Ann. Code Art. 25, § 53 (2001) (65a). PDAs are charged with the responsibility to:

> [L]ocate and establish ditches, drains, or canals, and to cause to be constructed,...widened, or deepened any ditch...or watercourse for the purpose of establishing and maintaining watershed drainage systems....

Id. § 52(a) (64a). State regulations require that PDA ditches be maintained to "assure the protection of natural resources and prevent water pollution by non-point source pollutants associated with agricultural drainage products." Md. Regs. Code tit. 15, § 20.01.01 (66a).

There are more than 100 active PDAs on the Eastern Shore of Maryland managing the drainage of more than 180,000 acres of land, primarily for agricultural purposes. In addition, there are "hundreds of miles of roadside ditches to facilitate transportation...[and] myriad farm ditches on private land...all of [which] functionally interact...with one ultimate purpose, *i.e.*, to move water quickly from the land." *See* Moving Water: A Report to the Chesapeake Bay Cabinet by the Public Drainage Task Force (October 2000) at 8, http://ces.washcoll.edu/ditching_report.pdf (last visited Nov. 7, 2003). The Maryland legislature has declared that "such drainage shall be considered a public benefit and conducive to the public health, convenience, and welfare." Md. Ann. Code Art. 25, § 52 (2001) (64a).

III. Enforcement Action Against the Deatons.

In 1989, the Deatons purchased 12.8 acres of land in rural Wicomico County, planning to build a home for themselves and four additional houses for sale to others. However, the county health department would not approve installation of sanitary drainfields on the site because of a high water table. To lower the water table,

the Deatons dug a drainage ditch through their property and, at the corner of their property, connected it to the roadside ditch, depositing some of the excavated dirt on adjacent land the Corps considers wetlands.

The Corps ordered the Deatons to stop work and initiated the enforcement action at issue. The Corps claimed that the Deatons needed a permit because their land contains a wetland and is "adjacent to Headwaters of Purdue Creek [sic], a tributary of the Wicomico River, which itself is a water of the United States...." (Compl. ¶ 23.) But as the case wore on, the Corps developed the theory that the roadside ditch is a "tributary" to which the Deatons' wetland is "adjacent," making them both "navigable waters" under the Corps's interpretation of the CWA.

IV. The Corps's Failed "Dye Test."

The Corps's failed effort to demonstrate a connection between the Deatons' property and the Wicomico River is documented in an affidavit describing a "dye test" conducted on May 17, 1996. (67a-69a.) At 8:18 a.m., the Corps placed tracing dye on the Deaton property at a location upgradient of the ditch the Deatons had dug. The affidavit reports that the Corps added dye "*as necessary to maintain a detectable level* for observations and photography," but does not indicate how often it was necessary to bolster the dye to "maintain a detectable level." The Corps next observed dye at the ditch that the Deatons had dug (9:47 a.m.), then at the culvert under Morris Leonard Road (10:24 a.m.) where the Deatons' ditch meets the roadside ditch, and finally at the nonnavigable confluence of Perdue Creek and Beaverdam Creek (4:16 p.m.). This final sighting was only two miles from the Deatons' property, but still six miles short of the Wicomico River. (*See* 77a.)

Most remarkably, the Corps *never placed dye in the roadside ditch itself*, which it claims is the jurisdictional linchpin for this entire case. The Corps only observed dye

in the ditch the Deatons had dug (which it has never claimed to be a tributary) and then at the end of the Deatons' ditch at the northwest corner of the property at the point where the Deatons' ditch meets the roadside ditch at the culvert under Morris Leonard Road.

There is no evidence in the record to show whether or how dye would have moved in the roadside ditch itself. Additionally, there is nothing in the record to suggest that dirt from the Deatons' ditch-digging ever migrated across the site to the roadside ditch or into the ditches of Wicomico County, or that such dirt reached and degraded the Wicomico River.

V. The Lower Court Decisions.

On cross-motions for summary judgment, the district court decided that "the surface water connection between the Deaton parcel and the Chesapeake Bay...makes any wetlands on the Deaton property contiguous with, and therefore adjacent to, waters of the United States." (31a.) Thus, the district court upheld CWA jurisdiction on the theory that the wetland is "adjacent" because of the attenuated path to distant navigable-in-fact waters.

The Court of Appeals had a different theory. Downplaying the specific roadside ditch at issue, the court started with a constitutional analysis and asked whether, categorically, nonnavigable tributaries to navigable waters could be regulated under the Commerce Clause. (10a.) Observing that Congress has the authority to regulate the channels of interstate commerce to keep them free from "immoral and injurious uses" (10a-11a), it reasoned that any pollutant in a nonnavigable tributary has the "*potential* to move downstream" and degrade navigable waters. (13a, emphasis added.) When the Deatons argued there was no showing that any pollutants ever left their property or reached the Wicomico River, the court cited *Wickard v. Fillburn,* 317 U.S. 111 (1942): Congress "may decide that the aggregate effect of all of the individual instances of discharge...justifies regulating each

of them.... [I]f Congress itself has the authority to make that decision, it may delegate it to the Corps." (13a.)

Having concluded that jurisdiction over "nonnavigable tributaries" is "well within" Congress's powers, the court below reasoned that "the Corps' interpretation does not invade an area of authority reserved to the states" (13a), nor did the Corps's position "invoke the outer limits of Congress's power or alter the federal-state framework...." (14a.) Thus, the court rejected the Deatons' argument that a "clear statement" by Congress was needed to sustain the agency's interpretation. (8a-9a.)

Turning lastly to the statute, the Court of Appeals held that Congress's definition of "navigable waters" as "waters of the United States" makes the Act "sufficiently ambiguous to constitute an implied delegation of authority to the Corps." (17a.) So it looked to the Corps's regulations, but found that the "regulation is ambiguous on the question of how far the coverage of tributaries extends." (19a.) The court therefore referred to the interpretation provided in the government's brief and concluded that under the regulation "jurisdiction extends to any branch of a tributary system that *eventually flows* into a navigable body of water." (19a, emphasis added.) "In short, the word 'tributaries' means what the Corps says it means." (20a.) Although previous regulations excluded ditches such as the roadside ditch at issue here (*see supra* n.3), and this Court cited those regulations approvingly in *SWANCC*, the Court of Appeals reasoned that the Corps's understanding had "evolved," and that therefore "deference is appropriate." (21a.) "The Act thus reaches to the roadside ditch and its adjacent wetlands." (22a.)

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's Analysis of CWA Jurisdiction Contradicts This Court's Cases and Conflicts with the Fifth Circuit's Decision in *Rice*.

In *Riverside,* this Court upheld the Corps's authority to regulate wetlands "adjacent" to navigable-in-fact waters. It reserved the jurisdictional question regarding wetlands that are "not adjacent to bodies of open water"—the precise scenario presented here. 474 U.S. at 131 n.8. In *SWANCC,* the Court rejected the Corps's assertion of jurisdiction because "the text of the statute will not allow" coverage of ponds that "are *not* adjacent to open water." 531 U.S. at 168 (original emphasis). The *SWANCC* dissent read the majority opinion as "excising" from the CWA "intermittent rivers, streams, tributaries and perched wetlands that are not contiguous or adjacent to navigable waters." *Id.* at 189, 190 n.14 (Stevens, J., dissenting).

This Court's prior cases make clear that neither the roadside ditch nor the wetland next to it are "navigable waters" under the Act because neither is "adjacent to open water." Yet the Corps has claimed jurisdiction nonetheless, and the Court of Appeals has upheld that claim.

A. The Fourth Circuit Ignored the "Significant Nexus" Principles of *Riverside* and *SWANCC* and Substituted a "Some Connection" Test.

The *Riverside* Court upheld jurisdiction over "adjacent" wetlands because it discerned a congressional intent to regulate wetlands that are "inseparably bound up with the 'waters of the United States.'" 474 U.S. at 134. The Court emphasized that the wetlands in that case, described as "80 acres of low-lying marshy land," "actually abut[ted] on a navigable waterway," Black Creek. *Id.* at 124, 135. The *SWANCC* Court also stressed that the *Riverside* wetlands "actually abutted on a

navigable waterway," and further observed that its holding in *Riverside* "was based in large measure on Congress's unequivocal acquiescence to, and approval of, the Corps's regulations interpreting the CWA to cover wetlands adjacent to navigable waters." *SWANCC,* 531 U.S. at 167. *SWANCC* reinforced the need for an "inseparable" relationship between nonnavigable and navigable resources: "It was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes.*" *Id.* (emphasis added). Accordingly, finding no inseparable relationship between the nonnavigable, isolated ponds at issue in *SWANCC* and a body of "open water," this Court held that the Corps's claim of jurisdiction "exceeds the authority granted to [the Corps] under Section 404(a) of the CWA." *Id.* at 174.

The Fourth Circuit lost sight of the reasoning in *Riverside* and *SWANCC.* Here, the ditch is far removed from navigable waters, with only a theoretical connection—certainly not an inseparable one. And, while the Court of Appeals acknowledged this Court's "significant nexus" principle, it nonetheless upheld jurisdiction over the roadside ditch (and the adjacent wetland on the Deaton property) based on the unsupported assumptions that the ditch is a tributary, and that "there [is] *a nexus* between a navigable waterway and its nonnavigable tributaries." (22a, emphasis added.) It further misinterpreted this Court's decisions as authorizing jurisdiction over "nonnavigable waters…with *some connection* to navigable ones." (17a, emphasis added.) Indeed, said the panel below, "jurisdiction extends to *any* branch of a tributary system that *eventually flows* into a navigable body of water." (20a, emphasis added.)

But this Court never premised CWA jurisdiction on "a" nexus, "some" connection, or "eventual flows." Rather, this Court's "significant nexus" principle gives effect to Congress's intent. On one hand, it gives the term "'navigable'…at least the import of showing what

Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC,* 531 U.S. at 172. On the other, it recognizes Congress's intent "to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.* at 167 (quoting *Riverside,* 474 U.S. at 133). "*A* nexus," "*some* connection," and "*eventually* flows" are contrary to this careful balance.

B. The Circuits are in Conflict on the Meaning of This Court's "Significant Nexus" Principle.

The court below acknowledged that the Deatons and the Corps disagreed on "how much water flows through the ditch, and how consistent the flow is, but they agree on the ditch's course…a winding, thirty-two mile path to the Chesapeake Bay." (3a-4a.) For the Fourth Circuit, the ability to trace a course to navigable-in-fact waters was sufficient, by itself, to establish jurisdiction over the roadside ditch. The frequency and duration of water flow were irrelevant.

But facts like the amount, duration, and frequency of water flow *are* relevant to the "significant nexus" inquiry, as interpreted by the Fifth Circuit. In *Rice*, the Fifth Circuit applied *Riverside* and *SWANCC* to reject claims of jurisdiction over intermittent streams, *even though some connection to navigable waters existed:*

> There is no detailed or comprehensive description of any of these seasonal creeks available in the record. There is also very little evidence of the nature of Big Creek itself.... There is no detailed information about how often the creek runs, about how much water flows through it when it runs, or about whether the creek ever flows directly (above ground) into the Canadian River. In short, there is nothing in the record that could convince a reasonable trier of fact that either Big Creek or any

> of the unnamed other intermittent creeks on the ranch are *sufficiently linked* to an open body of navigable water....

250 F.3d at 270-71 (emphasis added). Thus, the Fifth Circuit sought a "close, direct and proximate link between [the defendant's discharges] and any resulting... contamination of a particular body of natural surface water...," not a mere hydrological connection. *Id.* at 272.

The Sixth Circuit has relied heavily on the Fourth Circuit's decision here to sustain an expansive interpretation of CWA jurisdiction. *See, e.g., United States v. Rapanos,* 339 F.3d 447, 454 (6th Cir. 2003) (possibility that *Rapanos* wetlands "could affect" navigable-in-fact waters miles away provides "ample nexus"). Indeed, *Deaton* has already spawned another opinion from the Fourth Circuit as well as a Seventh Circuit opinion, and both are currently the subject of petitions pending before this Court. We respectfully cross-reference the Petitions for Writ of Certiorari in *Rueth Development Co. v. United States,* No. 03-548, at 25-28 (Oct. 8, 2003), and *Newdunn Assocs. LLP v. U.S. Army Corps of Eng'rs,* No. 03-637, at 8-13 (Oct. 30, 2003), particularly for their descriptions of the confusion in the lower courts and the regulatory agencies. Certiorari is warranted to reconcile these conflicting interpretations of the CWA's scope.

C. The Fourth Circuit Ignored This Court's Clear Holding that Wetlands Must be Adjacent to "*Open*" Water to Support CWA Jurisdiction.

Even if the roadside ditch were itself a CWA "navigable water," the Corps nonetheless exceeded its authority by regulating the Deatons' *wetland.* The wetlands in *Riverside* were properly regulated as "adjacent" because they actually abutted Black Creek, a navigable waterway. 474 U.S. at 135. *SWANCC,* explaining *Riverside*, stated that "the text of the statute will not allow" the extension of jurisdiction to waters

"that are *not* adjacent to open water." 531 U.S. at 168. In *Rice*, the Fifth Circuit, in contrast to the court below, followed *SWANCC* when it held that "a body of water is subject to regulation under the CWA if [it] is actually navigable or is adjacent to an open body of navigable water." 250 F.3d 264, 268.

The term "open water" is used throughout Supreme Court jurisprudence as synonymous with traditional navigable water.[6] Like the sand and gravel pits in *SWANCC,* the wetland on the Deaton parcel is "*not* adjacent to open water." *SWANCC,* 531 U.S. at 168. Neither is the ditch. Therefore, neither should be deemed "navigable waters."

II. The Fourth Circuit's Constitutional Analysis is Inconsistent with this Court's Precedents and Conflicts with Other Circuits.

A. The "Commerce Power Over Navigation" Cannot Encompass Regulation of this Roadside Ditch, Much Less the Wetland Alleged To Be Adjacent to It.

> "[T]he powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."

Marbury v. Madison, 5 U.S. 137, 176 (1803) (Marshall, C.J.). In *SWANCC,* this Court identified the constitutional authority for the CWA as Congress's "commerce power over navigation," 531 U.S. at 165 n.2, and explained that Congress intended to exercise "its traditional jurisdiction

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[6] *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 190 (1979) (referring to Maunalua Bay, a truly navigable water, as an "open water") (Blackmun, J., dissenting); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552, 558 (1947) (explaining that pilots take ships from "open waters" to local waters); *United States v. Oregon*, 295 U.S. 1, 22 (1935) (using "open water" to describe the area where boats could be used).

over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172.[7] The Fourth Circuit agreed that the CWA's constitutional source is Congress's jurisdiction over navigable waters. (10a.)

Congress's power over navigable-in-fact waters is "plenary," "as broad as the needs of commerce," and not "limited to the control of navigation." *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1941) (Federal Power Commission may require license for dam construction on navigable New River for purposes unrelated to navigation, such as power development and resource planning.) However, federal authority over activities on nonnavigable waters is not as broad. Under the commerce power, federal regulation of activities on nonnavigable waters has been sustained, but only upon findings or evidence demonstrating that the activity at issue will actually impact navigable waters. For example, *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899), confirms Congress's power to prevent a state's appropriation of water, "even at a place above the limits of navigability,...[that] diminish[es] the volume of waters [flowing into] a navigable stream, to such an extent as to destroy its navigability." *Id.* at 709. In reaching this conclusion, the Court examined international treaties, "affidavits and other evidence" and determined that the state's uses would "substantially interfere[] with the navigable capacity" of the Rio Grande River and therefore could be enjoined pursuant to the Rivers and Harbors Act of 1890. *Id.* at 708-09. *Oklahoma ex rel. Phillips v. Guy*

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[7] *The Daniel Ball*, 77 U.S. 557, 563 (1870) (mem.), provides the classic definition of "navigable waters" as waters that "are used, or susceptible of being used, in their ordinary condition, as highways for commerce...." Down the years, this definition has been clarified to include waters that are now, have been in the past, or may with reasonable improvements, be used by vessels in interstate or foreign commerce. *See United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-09 (1940); *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921).

F. Atkinson Co., 313 U.S. 508 (1941), is similar. After considering an extensive legislative and engineering record documenting the need to control water flows in tributaries to protect the Mississippi River from flooding, the Court upheld congressional authority over the river's nonnavigable stretches. *Id.* at 516-24. It found the effects on the navigable river "tangible." *Id.* at 524.

Of course, neither the roadside ditch nor the Deatons' wetland is navigable-in-fact, so Congress does not have plenary power to regulate all activities on them. Under cases like *Rio Grande Dam* and *Oklahoma*, to render the roadside ditch and the wetland next to it "navigable waters," there must be some evidence that doing so is necessary to prevent the Deatons' actions from causing a tangible, actual impact to navigable waters (*i.e.*, the Wicomico River.) That evidence does not exist. Nothing in the record suggests that dirt left the Deatons' property, flowed through the roadside ditch, or reached, much less degraded, downstream navigable waters. The dye test (*supra* at 7-8) proves only that the Corps stopped observing dye six miles short of the Wicomico River.

In no case has this Court *presumed* an impact to navigable waters as justification under the Commerce Clause to regulate activities on nonnavigable waters, much less to federalize the waters themselves. But the Court of Appeals did just that. It reasoned that "any pollutant" in nonnavigable waters "has the *potential* to move downstream and degrade the quality of the navigable waters themselves." (13a.) There are no legislative findings, administrative records, or factual evidence here to support the lower court's assumption that the Deatons' ditch-digging caused dirt to reach the remote, low-volume, intermittent roadside ditch, much less move downstream to damage the Wicomico. The commerce power over navigation cannot stretch so far as to encompass such conjectured, hypothetical impacts.

B. The Fourth Circuit Misapplied This Court's "Immoral or Injurious Use" Cases.

In upholding the Corps's action, the Court of Appeals cited three areas Congress may regulate under the Commerce Clause: (1) use of the channels of interstate commerce; (2) instrumentalities of interstate commerce, including persons or things in interstate commerce; and (3) activities having a "substantial effect" on interstate commerce. *United States v. Lopez,* 514 U.S. 549, 558-59 (1995). These categories are well established. *See Pierce County v. Guillen,* 537 U.S. 129, 147 (2003); *United States v. Morrison,* 529 U.S. 598, 609 (2000). The Fourth Circuit described them as "three distinct spheres." (10a.) Indeed, they are analytically distinct, *United States v. Robertson,* 514 U.S. 669, 670-71 (1995) (*per curiam*), and each "sphere" has its own doctrinal integrity, unique mode of analysis, and specific body of case law. As one judge has stated, it is improper to "'mix and match' attributes of the various categories" from *Lopez* to expand congressional authority. *United States v. Faasse,* 265 F.3d 475, 499 n.2 (6th Cir. 2001) (Batchelder, J., dissenting). Yet that is precisely what the Court of Appeals did here.

After citing *Lopez*'s three categories, the Fourth Circuit stated that Congress's "power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce." (10a.) It held that Congress's channels power, "unlike its power to regulate activities with a substantial relation to interstate commerce, reaches beyond the regulation of activities that are purely economic in nature" (10a), and that Congress may use its power over commercial channels to "prevent the use of navigable waters for injurious purposes." (12a.) The Fourth Circuit relied on cases such as *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), in which this Court cited Congress's power to regulate travel of persons and property in interstate commerce to uphold the Civil Rights Act of 1964, which prohibits racial

discrimination in "any inn, hotel, or motel" if its operations "affect commerce." *Id.* at 247. Likewise, *Caminetti v. United States,* 242 U.S. 470 (1917), upheld the Mann Act, which prohibited the transfer of women across state lines for immoral purposes. And, in *United States v. Darby,* 312 U.S. 100 (1941), the Court found Congress had the authority to exclude from interstate channels certain goods manufactured in violation of the wage and hour restrictions of the Fair Labor Standards Act. Such goods may be "injurious to the public health, morals or welfare...." *Id.* at 114.

The Fourth Circuit turned to this line of cases on its own (the Corps never raised the "immoral or injurious use" argument), but they are wholly inapposite. None of the cited decisions support the proposition that Congress may regulate activities on a nonchannel simply because they may potentially result in injurious uses of *the* channel. The cited cases all involve actual interstate activity on, and uses of, a commercial channel *itself.*[8]

The Deatons dug a short ditch on their own property. No one has suggested that their property, or the roadside ditch alongside it, is a channel of commerce. To the extent the Fourth Circuit found injury in the "potential" for sediment to "move downstream" and degrade navigable waters (13a), it ignored the evidence in this case. There is no showing that sediment even left the Deaton property, much less degraded navigable waters.

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[8] The Court of Appeals found that the Corps's regulation over "tributaries" *generally* (33 C.F.R. § 328.3(a)(5)) (*see* 62a) "fits comfortably within Congress's authority to regulate navigable waters" (8a), and that "Congress has the authority to regulate discharges in nonnavigable tributaries" *categorically* to protect navigable waters. (13a.) But the Deatons never asked the Fourth Circuit to assess the facial validity of the Corps's (a)(5) regulation; the Deatons do not believe the roadside ditch is a tributary at all. Regardless, it would stretch this Court's jurisprudence to conclude that the roadside ditch at issue "fits comfortably" within the Commerce Clause, but the lower court dodged that question with its shift in focus.

This Court has warned against "pil[ing] inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez,* 514 U.S. at 567. *See also Morrison,* 529 U.S. at 615 & n.6 (rejecting the use of a limitless "but-for causal chain" of potential impacts on commerce).

C. The Fourth Circuit Created Conflict When it Imported an "Aggregate Effects" Test Into its "Channels of Commerce" Analysis.

Having treated the activity subject to regulation here as *noneconomic* in order to cite the "immoral and injurious use" cases, the court below then relied on aggregation principles that are applicable only to intrastate *economic* activities to overcome the concededly trivial nature of the Deatons' actions. It stated, "Congress [or the Corps, using its delegated authority] *may...decide* that the aggregate effect of all of the individual instances of discharge, like the discharge by the Deatons, justifies regulating each of them." (13a, citing *Wickard v. Fillburn,* 317 U.S. 111 (1942).) The Court of Appeals pointed to no congressional or administrative decision to aggregate such activities, nor did it explain how aggregation could be applied to noneconomic activities in a channels analysis.

By importing the "aggregate effect" principle into its channels of commerce analysis, the court below strayed markedly from established constitutional law and placed itself in sharp conflict with other Circuits. The aggregation principle *is strictly a Lopez sphere 3 concept. It is misplaced in a sphere 1 "channels" analysis. See Morrison*, 529 U.S. at 611 n.4 ("[I]n every case where we have sustained federal regulation under the aggregation principle in *Wickard v. Filburn*, the regulated activity was of an apparent commercial character" (citations omitted)). *Lopez*'s three spheres are "analytically distinct," and the "'affecting commerce' test was developed in our

jurisprudence to define the extent of Congress's power over purely *intra*state commercial activities that nonetheless have substantial *inter*state effects." *Robertson,* 514 U.S. at 670-71 (original emphasis). Thus, in *Robertson*, which involved federal regulation of a gold mine that was "engaged in interstate commerce," it was not necessary to consider whether the activity "substantially affected" interstate commerce. *Id.* at 673. As Professor Tribe writes, *Robertson* confirms that "the 'substantial effect' requirement applies only to the third category; the first two categories, *by definition,* substantially affect—because they are *components* of—interstate commerce." Laurence Tribe, American Constitutional Law Vol. I, § 5-5 at 826-27 (3d ed. 2000) (original emphasis).

Consequently, the cases that have used the aggregation principle are all *Lopez* sphere 3 cases, whereas courts employing a channels or instrumentalities analysis have uniformly found aggregation and substantial effects principles inapposite.[9] The Fourth Circuit engendered conflict with all of them when it mobilized the aggregate effects principle in service of its already expansive channels analysis.

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[9] *United States v. Al-Zubaidy*, 283 F.3d 804, 811 (6th Cir. 2002) ("[w]here Congress seeks to regulate the channels or instrumentalities of interstate commerce, it is not bound by the 'substantial effects' test"); *United States v. Lankford*, 196 F.3d 563, 572 (5th Cir. 1999) (in channels analysis, "we need not address whether [an activity] 'substantially affects' interstate commerce, as required under *Lopez*'s third prong"); *United States v. DiSanto*, 86 F.3d 1238, 1245 (1st Cir. 1996) (*Lopez*'s spheres are "analytically distinct," citing *Robertson*); *United States v. Pappadopoulos*, 64 F.3d 522, 526 (9th Cir. 1995) (same); *United States v. Nichols*, 928 F. Supp. 302 (S.D.N.Y. 1996) ("[w]hen assessing regulations in [the channels of commerce] category, there is no 'substantially affects element'"), *aff'd by unpub. op.*, 113 F.3d 1230, 1997 WL 280064 (2d Cir. 1997); *United States v. Goldberg*, 928 F. Supp. 89, 96 (D. Mass. 1996) (*Lopez* spheres 1 and 2 "are not subject to the 'substantially affect' test").

Picking and choosing among *Lopez*'s categories, as if *Lopez* were a constitutional buffet, disserves the Commerce Clause. Certiorari should be granted to rectify the conflict that the Fourth Circuit has created.

D. Federal Regulation Over This Roadside Ditch Would Obliterate the Distinction Between "What is National and What is Local."

The Commerce Clause is not a federal police power. It is "subject to outer limits." *Lopez,* 514 U.S. at 556. In *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1939), this Court warned that the commerce power "must be considered in the light of our dual system of government and may not...embrace effects on interstate commerce [that]...would effectually obliterate the distinction between what is national and what is local...." *Id.* at 37. *See also United States v. Morrison,* 529 U.S. 598, 617 (2000) ("[t]he Constitution requires a distinction between what is truly national and what is truly local").

Maintaining separate realms of federal and state authority is part of the Framers' vision to safeguard our personal liberties. Justice Kennedy, joined by Justice O'Connor, wrote:

> [I]t was the insight of the Framers that freedom was enhanced by the creation of two governments.... "Hence, a double security arises to the rights of our people. The different governments will control each other, at the same time that each will be controlled by itself."

Lopez, 514 U.S. at 576 (1995) (Kennedy, J., concurring) (quoting The Federalist No. 51, at 323 (C. Rossiter ed. 1961) (J. Madison)). *See also Gregory v. Ashcroft,* 501 U.S. 452, 458 (1991) ("a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front").

In the CWA, Congress left it to the states to develop local programs, including land use requirements, to

control nonpoint sources of pollution such as stormwater runoff. *See, e.g.*, 33 U.S.C. § 1288(b)(2)(F); *id.* § 1313(f); *id.* § 1314(f); *id.* § 1329. Here, the State of Maryland established its PDA program to control local drainage from nonpoint sources, and Wicomico County built the roadside ditch to collect stormwater runoff and prevent flooding on the Morris Leonard Road. *See supra* at 5-6 (discussion of Maryland PDA system). Thus, on one hand, ditches have been created by state bodies to control nonpoint source runoff as allowed by the CWA, but, on the other hand, the Corps would regulate those ditches as "navigable waters" and subject them to federal permitting requirements. Moreover, Maryland's General Assembly has enacted its own comprehensive program to protect nontidal wetlands. *See* Md. Code Ann., Environment § 5-902(a) (1996) ("The General Assembly finds that nontidal wetlands play important roles in the preservation and protection of the Chesapeake Bay and other waters of the State").

"[C]itizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. 'Federalism serves to assign political responsibility, not to obscure it.'" *Lopez,* 514 U.S. at 576 (Kennedy, J., concurring) (citing *FTC v. Ticor Title Ins. Co.,* 504 U.S. 621, 636 (1992)). The Corps's federalization of the roadside ditch and the Deatons' wetland contravenes these principles. Which level of government now controls the PDA ditch system? To whom should citizens look to address local drainage concerns? Certiorari should be granted to clarify the distinctions between "what is national and what is local."

III. The Fourth Circuit Failed to Apply the "Clear Statement" Rule and Incorrectly Deferred to the Corps's Unreasonable Interpretation.

A. The Fourth Circuit Violated the Clear Statement Rule.

The "most important" rule of statutory construction "is the clear statement rule." *See* I Tribe § 5-9 at 853. Where an agency interprets a statute in a manner that "invokes the outer limits of Congress's power" or "overrides…[the] usual constitutional balance of federal and state powers," this Court "expect[s] a clear indication that Congress intended that result." *SWANCC,* 531 U.S. at 172-73; *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991) (citing *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242-43 (1985)). For example, in the Fourth Circuit's Commerce Clause analysis (*supra* at 19-21), the only case cited to support aggregation is *Wickard v. Fillburn* (*see* 13a), "perhaps the most far reaching example of Commerce Clause authority over intrastate activity…." *Lopez,* 514 U.S. at 560. On this point alone, the Court of Appeals skirted the Constitution's outer bounds. It should have searched for a clear statement that the CWA covers this roadside ditch.

Had it looked, it would have come up empty-handed. *SWANCC* found "nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit…." *Id.* Likewise, there is no clear statement that the CWA's scope includes nonnavigable ditches that could "potentially" impact or "eventually flow" into navigable waters. In fact, ditches are specifically included in the Act's definition of "point source" (*supra* n.4). *See Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 546 (2002) ("look[] for a clear statement of what the rule *includes,* not…what it *excludes*") (original emphasis).

Moreover, the clear statement requirement is "heightened" where an *agency* interprets a statute in a

manner that would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 173. The Court of Appeals held that the Corps's determination that the ditch is a "water of the United States" is "well within" Congress's power to protect navigable waters. (13a.) Thus, the Corps's interpretation did "not alter the federal-state framework" (14a), and the clear statement rule was not triggered. But the Fourth Circuit missed the point. The question is not whether Congress *has* the power to categorically regulate nonnavigable tributaries to protect navigable waters, but whether the *exercise* of that federal power in a case such as this trenches on state authority. Here, the Corps has not merely required a permit for the discharge of a pollutant that flows from a point source (*i.e.*, a nonnavigable ditch) into navigable water. It has transformed the roadside ditch *itself* into a "navigable water," thereby subjecting any activity that impacts the ditch to all CWA requirements and penalties.

This result undoubtedly intrudes on traditional state functions and thus triggers the clear statement requirement. The regulation of land and water use within a state's borders is a traditional state function. *See SWANCC,* 531 U.S. at 174 (citing *Hess v. Port Authority Trans-Hudson Corporation,* 513 U.S. 30, 44 (1994)). The roadside ditch at issue is maintained by the county roads department to collect rainfall runoff that would otherwise collect on the road. It feeds into a series of ditches constructed and maintained by the Beaverdam PDA, which is one of over 100 PDAs on Maryland's Eastern Shore. PDAs are county-level political entities established under Maryland law. The drainage accomplished through these ditch systems is considered under Maryland statute a "public benefit...conducive to the public health, convenience and welfare." (*See* 64a.)

Deeming the ditch a federal "navigable water" changes everything. What was once a ditch subject to local control is now a "water of the United States," subjecting a plethora of local activities to federal

regulatory requirements that trump local drainage concerns. If this ditch is a "navigable water," so are most ditches. Water runs downhill and "eventually flows" to navigable waters. Ditches are everywhere. U.S. Department of Transportation regulations require that any federally funded primary road must be "designed...and maintained to have adequate drainage, cross drains, and ditch relief drains." 30 C.F.R. § 816.151(d)(1). Similar requirements are commonplace under state and local law. Thus, many roads have ditches on both sides, and some even have additional ditches in the median strip. With more than 3.9 million miles of roads in this country, this adds up to a lot of ditches.[10]

Nothing in the CWA states that the term "navigable waters" reaches so far. As this Court emphasized in *SWANCC*, Congress preserved the "federal-state balance" when it "chose to 'recognize, preserve and protect the primary responsibilities and rights of States to...plan the development and use...of land and water resources...'" within their borders. 531 U.S. at 166-67 (citing 33 U.S.C. § 1251(b)). Tellingly, the Fourth Circuit did not cite this provision of the Act anywhere in its opinion.

B. The Fourth Circuit Erred in Reaching the Point of Deference to the Corps's Interpretation.

Failing to comply with the clear statement rule, the Court of Appeals erroneously deferred to the Corps's statutory interpretation. (*See* 21a-22a.) The two-step analysis for judicial review of agency action is axiomatic. First, if Congress has spoken to the issue, "that is the end of the matter," and a court must give effect to clearly expressed legislative intent. *Chevron USA, Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 842 (1984). If,

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[10] *See* U.S. Dep't of Transp., Federal Highway Admin., Highway Statistics 2001 § V, Roadway Extent, Characteristics and Performance, Table HM-10, at http://www.fhwa.dot.gov/ohim/hs01/hm10.htm (last visited Nov. 6, 2003).

however, the statute is silent or ambiguous on the question at hand, then under step 2 a court must defer to the agency's statutory interpretation as long as it is reasonable. *Id.* at 843. Where the clear statement rule is triggered—as it should have been here—"explicit *congressional* authorization" is required. A court may not find that clear statement by deferring to an agency's interpretation.[11]

Indeed, administrative deference requires ambiguity in the statute. The *SWANCC* Court stopped at step 1 under *Chevron* and did not defer to the Corps. It decided that "the text [of the CWA] will not allow" the Corps's claim of jurisdiction over "ponds that are *not* adjacent to open water." *SWANCC*, 531 U.S. at 168 (original emphasis). The Court found "§ 404(a) to be clear" that nonnavigable isolated ponds were outside the CWA's scope, because "Congress had in mind as its authority for enacting the CWA…its traditional jurisdiction over" navigable waters. *Id.* at 172. The Corps faced "a difficult task in overcoming the plain text and import" of the CWA, so it received no deference. *Id.* at 170. The Fourth Circuit contradicted *SWANCC* when it said the CWA is ambiguous and then when it deferred to the Corps. It thought it could "not tell from the Act the extent to which nonnavigable waters are covered" (17a), but *SWANCC* already identified the CWA's jurisdictional polestar: namely, Congress's traditional authority over navigable waters, which would exclude regulation of this roadside ditch.

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[11] Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2017, 2113 (1990) (original emphasis). *See also John v. United States*, 247 F.3d 1032, 1046 (9th Cir. 2001) (Kozinski, J., dissenting) ("*Chevron* deference has never been very persuasive…" where a clear statement is required; "*Chevron* and the clear statement rule are therefore at loggerheads…").

C. The Corps Was Not Entitled to Deference in Any Event.

Congress's intent to preserve the federal-state balance in the CWA, and to exercise its traditional authority over navigable waters, makes clear that the CWA does not reach this roadside ditch. But even if there were no need to invoke the clear statement rule, *and* the statute were ambiguous, the Corps's position would still not be owed deference. Affording deference to an agency depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Deference is at its lowest when, as here, the agency's position is "advanced for the first time in a litigation brief." *Id.* (citing *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-213 (1988)).

From the CWA's passage until the 1990s, the Corps explicitly stated that drainage and irrigation ditches are *not* "waters of the United States." *See supra* n.3. Despite such disclaimers, the Corps now asserts that the roadside ditch is a "tributary" and therefore a "navigable water" subject to the CWA. But the Corps's regulations do not define the term "tributary" or otherwise suggest that a ditch is a tributary.

The Corps's litigation position is not supported by the type of well-reasoned exercise of agency expertise that might have emerged on the subject of ditches during a public notice-and-comment rulemaking process.[12] Indeed, the Corps's claim that the roadside ditch is itself a water of the United States is a *post hoc* position developed *after*

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[12] The Corps's approach here is in stark contrast to the years-long rulemaking process this Court relied on in *Riverside*, where the Corps amassed an administrative record supporting its conclusion to regulate wetlands adjacent to open water. 474 U.S. at 134.

the complaint was filed. In short, the Fourth Circuit compounded its failure to apply the clear statement rule by deferring to the Corps's unreasonable position.

CONCLUSION

Within the last decade, it took two cases for this Court to clarify the scope of the Commerce Clause—first *Lopez* (1995), then *Morrison* (2000). This case is to *SWANCC* what *Morrison* was to *Lopez*. The lower courts have split on the meaning of "significant nexus," the importance of federalism, and the need for a clear congressional statement to support an agency interpretation that trenches on traditional state functions. The Deatons find themselves—as do countless other landowners and state and local agencies—on the wrong side of the divide. The serious constitutional implications and the importance of the issues to the Deatons, other landowners, and regulators warrant certiorari.

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Respectfully submitted,

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